

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN K. WERRETT,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security

Defendant.

NO. C07-227 CRD

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff Steven K. Werrett appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) who denied his applications for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“SSA” or the “Act”), 42 U.S.C sections 401-33 and Supplemental Security Income (“SSI”) disability benefits under Title XVI of the SSA, 42 U.S.C. sections 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court affirms the Commissioner’s decision and dismisses the case.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a forty-nine-year-old male, forty-two years old at the alleged disability onset date. Administrative Record (“AR”) at 28; 66. He completed the tenth grade and has work experience as an automobile mechanic, having last performed substantial gainful activity in 2001. AR at 77; 99-100. Plaintiff filed his application for benefits on November 13, 2002. AR at 66, 378-79. His claim was

1 denied initially and upon reconsideration; plaintiff made a timely request for a *de novo* hearing before an
2 ALJ. *Id.* at 37, 43, 46, 385. On April 4, 2005, Administrative Law Judge M.J. Adams conducted a
3 hearing. *Id.* at 410-51. The ALJ heard testimony from two witnesses: plaintiff, who was represented by
4 counsel, Robert A. Friedman, Esq., and a vocational expert. *Id.* On August 1, 2005, the ALJ issued a
5 decision finding plaintiff not disabled. *Id.* at 20-28. Plaintiff requested review by the Appeals Counsel
6 and on December 19, 2006, review was denied (AR at 6), rendering the ALJ's decision the final decision
7 of the Commissioner. 20 C.F.R. §§ 404.981, 422.210 (2006). On February 14, 2007, plaintiff initiated
8 this civil action for judicial review of the Commissioner's final decision. Dkt. No. 3.

9 II. JURISDICTION

10 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. sections 405(g)
11 and 1383(c)(3).

12 III. STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. section 405(g), this Court may set aside the Commissioner's denial of
14 social security benefits when the ALJ's findings are based on legal error or not supported by substantial
15 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005).
16 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as
17 a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
18 389, 402 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
19 determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that
20 might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to
21 examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of
22 the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
23 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be
24 upheld. *Id.*

25 IV. EVALUATING DISABILITY

26 As the claimant, Mr. Werrett bears the burden of proving that he is disabled within the meaning of
27 the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal

1 citations omitted). The Act defines disability as the “inability to engage in any substantial gainful activity”
2 due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of
3 not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under
4 the Act only if his impairments are of such severity that he is unable to do his previous work, and cannot,
5 considering his age, education, and work experience, engage in any other substantial gainful activity
6 existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*,
7 180 F.3d 1094, 1098-99 (9th Cir. 1999).

8 The Commissioner has established a five-step sequential evaluation process for determining
9 whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The
10 claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the
11 Commissioner. *Id.* If a claimant is found to be disabled at any step in the sequence, the inquiry ends
12 without the need to consider subsequent steps.

13 Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20
14 C.F.R. §§ 404.1520(b), 416.920(b).¹ If he is, disability benefits are denied. If he is not, the
15 Commissioner proceeds to step two. At step two, the claimant must establish that he has one or more
16 medically severe impairments, or combination of impairments, that limit his physical or mental ability to
17 do basic work activities. If the claimant does not have such impairments, he is not disabled. 20 C.F.R.
18 §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to
19 step three to determine whether the impairment meets or equals any of the listed impairments described in
20 the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or equals
21 one of the listings for the required twelve-month duration requirement is disabled. *Id.*

22 When the claimant’s impairment neither meets nor equals one of the impairments listed in the
23 regulations, the Commissioner must proceed to step four and evaluate the claimant’s residual functional
24 capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the Commissioner evaluates the
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26 ¹ Substantial gainful activity is work activity that is both substantial, *i.e.*, involves significant physical
27 and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R. § 404.1572.

1 physical and mental demands of the claimant's past relevant work to determine whether he can still
2 perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is able to perform his past
3 relevant work, he is not disabled; if the opposite is true, the burden shifts to the Commissioner at step five
4 to show the claimant can perform other work that exists in significant numbers in the national economy,
5 taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
6 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is
7 unable to perform other work, the claimant is found disabled and benefits may be awarded.

8 V. THE ALJ'S FINDINGS

9 Step One: The ALJ found that plaintiff had not engaged in substantial gainful activity at any time
10 relevant to the decision. AR at 27, Finding 2.

11 Step Two: The ALJ found that plaintiff's degenerative disc disease and affective disorder were
12 medically determinable severe impairments. *Id.*, Finding 3.

13 Step Three: The ALJ found plaintiff's impairments did not meet or equal the requirements of a
14 listed impairment. *Id.* at 27, Finding 4. The ALJ next determined that plaintiff retained a RFC for a
15 range of light work. *Id.*, Findings 6, 11.

16 Step Four: The ALJ found that plaintiff could not perform any of his past relevant work. *Id.* at
17 27, Finding 7.

18 Step Five: The ALJ determined that plaintiff could perform a significant number of other jobs in
19 the national economy. AR at 28, Finding 12. The ALJ therefore concluded plaintiff was not disabled as
20 defined in the SSA. *Id.*, Finding 13.

21 VI. ISSUES ON APPEAL

22 The principal issues on appeal are:

- 23 1. Did the ALJ err in finding plaintiff has the RFC for a range of light work, considering the
- 24 relevant medical opinions, plaintiff's mental abilities, and plaintiff's credibility?
- 25 2. Does additional evidence submitted after the ALJ's decision warrant remand?
- 26 3. Did the ALJ err in presenting the hypothetical questions to the vocational expert ("VE")?

27 Dkt. No. 12 at 1.

VII. DISCUSSION

A. *The ALJ did not err in finding that plaintiff has the RFC to perform light work.*

The ALJ determined plaintiff retained the RFC to perform a range of light work. AR at 27-28. Plaintiff challenges the RFC determination based on the ALJ's failure to properly evaluate: (1) the physician's opinions; (2) his mental condition; and (3) his credibility. Dkt. 12 at 12-18.

1. Medical Opinions

Plaintiff asserts that the ALJ erroneously relied upon a report of his RFC, such that the report was improperly considered because it was prepared by a non-physician and later endorsed by non-examining, state agency physician Guthrie Turner, M.D. Dkt. 12 at 12-13; Dkt. 15 at 6. Plaintiff argues that because Dr. Turner merely concurred but did not include any independent analysis, the ALJ relied on the report in error because it does not amount to "substantial evidence." Plaintiff does not cite to any rule of law or case law that supports this argument. Plaintiff curiously cites to a portion of SSR 96-6p: "[f]or example, the opinions of physicians or psychologists who do not have a treatment relationship with the individual are weighed by stricter standards, based to a greater degree on medical evidence, qualifications, and explanations for the opinions, than are required of treating sources" (Dkt. 12 at 13), however, the rule does not in any way prohibit a reviewing doctor from endorsing the opinions of another examiner or require additional comments from a reviewing doctor. Therefore this Court finds the ALJ did not consult the report in error, but reviewed it as required, as it is part of the complete record of this case.

Plaintiff also asserts that the ALJ erroneously rejected the opinion of treating physician Mary Starkebaum, M.D. Dkt. 12 at 14-16; Dkt. 15 at 6. To reject an uncontradicted opinion of a treating or examining doctor, an ALJ must state clear and convincing reasons that are supported by substantial evidence. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.1995); *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989). If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence. *Id.* "The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings."

1 *Magallanes*, 881 F.2d at 751 (internal citations omitted). The rejection of an opinion of a treating
2 physician based in part on the testimony of a nontreating, nonexamining medical advisor, may be upheld.
3 *Morgan v. Commissioner* 169 F.3d 595, 602 (9th Cir. 1999), citing *Magallanes*, 881 F.2d at 751-55;
4 *Andrews*, 53 F.3d at 1043; *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995).

5 In August 2002, Dr. Starkebaum examined plaintiff and noted that although he would not be able
6 to return to his prior work as an automobile mechanic, she recommended he be retrained for a less
7 physically demanding occupation. AR at 308. Dr. Starkebaum also noted that plaintiff proposed he be
8 retrained at doing computer work. In October 2002 Dr. Starkebaum again opined that plaintiff be
9 retrained for more sedentary work than his prior occupation. AR at 307. In January 2003 Dr.
10 Starkebaum noted that plaintiff could not bend or twist his back, that he could not perform his previous
11 job due to back injuries and that he would not be able to work at least half-time in a normal work setting,
12 but that he would benefit from job retraining. AR at 369. In July 2002 Dr. Starkebaum noted that she
13 “encouraged him to find a way to retrain for a job within his limitations that will also give him the salary
14 he requires” and that she recommended physical therapy. AR at 370. In the decision, the ALJ noted that
15 “[a]lthough Dr. Starkebaum opined that the claimant is disabled, the determination of disability is
16 reserved for the Commissioner and is given very little weight in this matter.” AR at 23. The ALJ also
17 noted that Dr. Starkebaum recommended that plaintiff receive vocational retraining, which, according to
18 the ALJ, “indicates that the claimant could work despite his physical limitations.” *Id.* Thus, the Court
19 finds the ALJ set forth specific reasons for partially discounting Dr. Starkebaum’s opinion, supported by
20 substantial evidence in the record. *Magallanes*, 881 F.2d at 751-55. Accordingly, the ALJ’s
21 determination regarding plaintiff’s RFC based on substantial evidence was not in error. *Bayliss* 427 F.3d
22 at 1214.

23 2. Mental Condition

24 Plaintiff asserts that the ALJ erroneously relied on the opinions of psychologist Kevin Morris,
25 Psy.D, because Dr. Morris found he had greater mental limitations than the ALJ found. Dkt. 12 at 18;
26 Dkt. 15 at 9. The ALJ discussed Dr. Morris’ findings:

27 ...[Dr. Morris] evaluated the claimant and opined that given the time the claimant needed

1 to complete the Trail Making Part A and B test he has moderate impairment with his
2 short-term memory. However, the claimant had no errors on the Trail Making tests. Dr.
3 Morris opined that the claimant has marked limitations in his ability to understand,
4 remember and follow complex instructions; exercise judgment and make decisions, relate
5 appropriately to co-workers and supervisors; interact appropriately with public contacts;
and respond appropriately to and tolerate the pressures and expectations of a normal work
setting. During psychological evaluation, the claimant followed a three-step command,
accurately performed calculations, recalled three objects after five minutes, performed
serial threes, spelled "world" forwards and backwards.

6 AR at 24.

7 The ALJ also discussed the opinions of Dr. Regents and Dr. Harrison, who found among other things
8 that plaintiff had limited abilities to understand and carry out detailed instructions. AR at 24. After a
9 discussion of the findings of the three psychologists, the ALJ concluded that the evidence supported that
10 plaintiff could function only at a level of basic work activity, follow simple instructions, and could make
11 simple work-related decisions necessary to function in unskilled work. The ALJ was not required to agree
12 with Dr. Morris nor to adopt his findings in whole. The ALJ has discretion to credit the portions of an
13 opinion that are supported by the record and consider the opinions of all other physicians. In this case the
14 ALJ analyzed the conclusions of the three psychologists and concluded that the totality of the evidence
15 indicated that plaintiff retained the mental ability for simple, unskilled work. The ALJ set forth specific
16 reasons for the weight assigned to Dr. Morris' opinion, which were supported by substantial evidence in
17 the record. As such, it is not in error.

18 Plaintiff also asserts that the ALJ did not adequately evaluate a July 2003 report given by Rodger
19 Mainz, Ph.D, regarding his mental condition. Specifically, plaintiff argues that the ALJ did not "grapple
20 adequately with test results showing that Werrett's Immediate Memory was in the fourth percentile, his
21 General Memory was in the sixth percentile, and his Working Memory was in the eighth percentile."
22 Dkt. 12 at 18. While plaintiff is correct that the ALJ did not discuss Dr. Mainz' test results in the
23 decision, plaintiff does not explain how or why such test results are inconsistent with the ability to
24 perform simple, unskilled work.

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28 ORDER - 7

3. Plaintiff's Credibility

Plaintiff asserts that the ALJ erred in making an adverse finding regarding his credibility. Defendant states (Dkt. 14 at 10; 12) that plaintiff does not dispute the ALJ's credibility finding, however plaintiff does dispute the credibility determination multiple times in his opening brief (Dkt. 12 at 12, 14, 17). Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. See *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *Thomas*, 278 F.3d at 958-59. In finding a claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In his decision, the ALJ in this case discussed plaintiff's credibility in detail:

Although the claimant alleged that he could not work due to his back pain and depression, his treating physicians opined that he could perform light work, as discussed above, and his activities of daily living evidence that he could perform work activities. The claimant reported that his activities of daily living consist of camping, watching television, gardening, visiting friends, walking his dog, fixing broken household items, and grocery shopping. It is notable that claimant reported trying to break up a fight between two dogs and ended up with a gash on his nose and forehead, which indicates that the claimant was physically attempting to break up the fight in spite of his alleged back pain. The claimant also reported that he waters his plants and pulls weeds. These activities of daily living evidence the claimant has the ability to engage in at least light work although he complained that he could not work due to his alleged back pain and depression. Even though the claimant complained that he has back pain, he reported that he could lift up to 25 pounds but has increased pain with bending. He further reported that his "depression would likely lift if he could be assisted in finding work that would accommodate his back and learning complaints, so long as it was a decent living. Furthermore, the record shows that the claimant failed to follow-up with treatment recommendations and continued to abuse alcohol even though his physicians recommended that not drinking would improve

1 his global health. Along with his alcohol dependance, the claimant has a history of drug
2 addiction. While driving to Utah the police stopped the claimant, searched his vehicle,
3 found narcotics in an unlabeled bottle and marijuana, and arrested him. The claimant then
4 requested that his treating physician write a prescription for the narcotic medications that
5 he had in the unlabeled bottle. During the hearing, the claimant testified that the charges
6 were dismissed because he proved that the claimant and his wife had prescriptions for the
7 narcotics. Given the inconsistencies in the record, I find that the claimant's allegations are
8 not entirely credible.

9 AR at 24 (citations omitted).

10 Plaintiff claims that substantial evidence does not support the ALJ's adverse credibility finding,
11 however this Court finds that the ALJ's detailed analysis sets forth clear and convincing reasons for not
12 fully crediting plaintiff's subjective complaints. The ALJ in his summary and analysis of the medical
13 evidence noted the lack of objective medical evidence supporting the severity of plaintiff's complaints; he
14 observed that the degree of limitation alleged by plaintiff as a result of his impairments was not supported
15 by the medical record or in his activities of daily living; he noted that plaintiff continued to drink alcohol
16 after being advised to stop, and noted inconsistencies in plaintiff's testimony (AR at 24). *See Smolen v.*
17 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (stating that an unexplained or inadequately explained failure
18 to follow a prescribed course of treatment is a relevant factor in assessing credibility). Accordingly, the
19 Court finds that the ALJ properly determined, based on the record, that plaintiff's subjective allegations
20 were less than fully credible. As such, the ALJ's credibility assessment is supported by clear and
21 convincing reasons, based on substantial evidence, and is free of legal error. *See Green v. Heckler*, 803
22 F.2d 528, 532 (9th Cir. 1986) (stating that ALJ's credibility determinations are entitled to "great
23 deference"); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (stating that ALJ's role is to judge
24 credibility of claimant).

25 *B. The additional evidence submitted to the Appeals Council does not warrant remand.*

26 Plaintiff asserts that evidence he submitted to the Appeals Counsel, after the ALJ's decision,
27 warrants remand to the ALJ for re-evaluation with the new evidence. Dkt. 12 at 14, 16. Specifically,
28 plaintiff asserts the evidence shows that although in November 2005 Dr. Starkebaum opined that she still
believed plaintiff should be retrained for a sedentary job, that in August 2006 Dr. Starkebaum opined that
plaintiff had been at all times unable to perform work on a full-time basis. Dkt 12 at 16. The ALJ

1 rendered his decision denying benefits in August 2005. AR at 28. In September 2006 plaintiff submitted
2 additional evidence consisting of the treatment notes and declaration of Dr. Starkebaum to the Appeals
3 Counsel. AR at 393-407. The Appeals Counsel considered the additional evidence and denied plaintiff's
4 request for review. Although the Appeals Council affirmed the decision of the ALJ, this evidence is part
5 of the record on review to this Court for determination of whether the ALJ's decision is supported by
6 substantial evidence. *See Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996); *Ramirez v. Shalala*, 8 F.3d
7 1449, 1452 (9th Cir. 1993).

8 In her August 2006 declaration, in a verbal question and answer format led by plaintiff's counsel,
9 Dr. Starkebaum stated that she had been treating plaintiff since 2002 and opined that plaintiff had not
10 been able to tolerate any full-time employment situation, even with the option to sit or stand at will. AR
11 at 406. Plaintiff argues that this evidence requires remand for evaluation of Dr. Starkebaum's notes and
12 declaration. After the ALJ has rendered an opinion, treating physician opinions that are solicited by
13 claimant's counsel for litigation purposes may be rejected as less persuasive. *See, e.g., Saelee v. Chater*,
14 94 F.3d 520, 522-23 (9th Cir. 1996); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996); *cf. Johnson v.*
15 *Callahan*, 975 F. Supp. 1366, 1371 (D. Or. 1997) ("Medical reports issued after the Commissioner's
16 decision . . . are deemed less persuasive than those issued prior to the decision.").

17 In this case, Dr. Starkebaum's declaration (AR at 404-407) was taken a year after the ALJ denied
18 benefits. Nevertheless, the declaration comes from a treating physician with expertise in the field, is not
19 devoid of all probative value. In the declaration, Dr. Starkebaum's ultimate opinion was that plaintiff was
20 unable to work full-time. Regardless, review of the remainder of the evidence shows no objective finding
21 of Dr. Starkebaum's is significantly different from that of the physicians' findings already considered by
22 the ALJ, including previous treatment notes from Dr. Starkebaum wherein she previously opined plaintiff
23 that was disabled, and as discussed above, with which the ALJ disagreed. Moreover, Dr. Starkebaum's
24 additional notes of April 2006 also stated: "social history: moved in with an older woman, a big untended
25 yard and a lot of accumulated junk... He has been engaged in helping her to clear things out." AR at
26 403. Dr. Starkebaum's declaration also reiterated her belief that receiving vocational training "might
27 improve his chances of finding some part-time work." AR at 406. Accordingly, even considering the

1 additional evidence of Dr. Starkebaum's declaration and notes, this Court finds the ALJ's decision was
2 based on substantial evidence in the record, and, as such, does not warrant remand. *Ramirez*, 8 F.3d at
3 1452; *Bayliss*, 427 F.3d at 1214.

4 *C. The hypothetical questions to the vocational expert were not in error.*

5 Plaintiff asserts that the ALJ made the following errors with respect to the questions he asked of
6 the VE: (1) the ALJ did not explicitly ask the VE whether his entire testimony was consistent with the
7 Dictionary of Occupational Titles ("DOT"); (2) the ALJ found plaintiff capable of performing four jobs,
8 three of which were beyond his reasoning ability; and (3) two of the three questions the ALJ asked of the
9 VE did not accurately reflect plaintiff's RFC assessment. Dkt. 12 at 7-12; Dkt. 15 at 2-5.

10 First, plaintiff argues that the ALJ erred in failing to explicitly ask the VE whether his testimony is
11 consistent with the DOT, as required by SSR 00-4p. Defendant argues that although the ALJ did not
12 explicitly ask the VE whether his testimony was consistent with the DOT, any error was harmless
13 because the record shows that the ALJ and the VE were discussing information from the DOT and made
14 multiple, specific DOT references with respect to every job discussed. In support of his argument under
15 SSR 00-4p, plaintiff cites *Massachi v. Astrue*, 486 F.3d 1149 (9th Cir. 2007) citing *Johnson v. Shalala*,
16 60 F.3d 1428 (9th Cir. 1995).

17 SSR 004-4p provides in relevant part, "[w]hen a VE or VS provides evidence about the
18 requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any
19 possible conflict between that VE or VS evidence and information provided in the DOT. In these
20 situations, the adjudicator will: ask the VE or VS if the evidence he or she has provided conflicts with
21 information provided in the DOT; and if the VE's or VS's evidence appears to conflict with the DOT, the
22 adjudicator will obtain a reasonable explanation for the apparent conflict." Accordingly, the *Massachi*
23 Court held that an ALJ may not rely on the testimony of a vocational expert without first inquiring
24 whether the VE's testimony conflicts with the DOT, but also noted that harmless error occurs where (1)
25 there is no conflict; or (2) if the VE provides sufficient support for the conclusion so as to justify any
26 potential conflicts. *Massachi* 486 F.3d at 1150-54.

27 In this case plaintiff asserts that there is a conflict between the VE's testimony and the DOT with

1 respect to the parking lot cashier job. Dkt. 12 at 8. At the hearing the VE testified that the parking lot
2 cashier job is sedentary as performed, noting that the job has a sit/stand option because the work is
3 performed in a booth with a rubber padded floor and includes the option to work sitting or standing.
4 However, plaintiff asserts the DOT classifies the job as light work, not sedentary work. At the hearing
5 the VE did not testify that the DOT classification was light rather than sedentary, and although also
6 uncontested by defendant, nothing in the record before this Court indicates whether the DOT classifies
7 the position as light or sedentary. Thus, at the time of the hearing, there was no apparent conflict, nor is
8 any conflict apparent based on the current record. Regardless, even if the VE's testimony did differ from
9 the DOT classification, the VE explained the basis for his classification of the job as sedentary work:
10 because the job is performed in a booth with an option to sit or stand, it is performed as a sedentary job.
11 AR at 448-49. Further, because the ALJ concluded plaintiff retained the ability to perform both a range
12 of light work as well as sedentary work, any error in classifying the work as sedentary versus light was
13 harmless. Moreover, the ALJ found plaintiff capable of performing three other job categories for which
14 plaintiff asserts no DOT conflict: that of final assembler, assembler, and sorter grader. AR at 28. Even
15 where the ALJ does not explicitly inquire whether the VE's testimony conflicts with the DOT, a
16 procedural error is harmless where there is no conflict or where the VE provides sufficient support for the
17 conclusion. *Massachi* 486 F.3d at 1154, fn 19. The Court finds the VE explained any deviation from the
18 DOT with adequate support.

19 Next, plaintiff argues that the ALJ found him capable of performing simple unskilled work but
20 that three of the jobs he found plaintiff capable of performing require reasoning skills beyond that of
21 simple work. Dkt. 12 at 9-10. Specifically plaintiff argues that only reasoning level 1 is consistent with
22 simple work and that of the four jobs, only the final assembler job is assigned reasoning level 1, while the
23 other three jobs are assigned reasoning level 2 or 3.² However, plaintiff cites no authority or regulation in
24 support of his assertion that only reasoning level 1 is consistent with simple, unskilled work, nor has this
25 Court found any rule or regulation consistent with the assertion. Defendant cites case law from other

26 ² The DOT assigns General Educational Development reasoning levels 1-6 to jobs representing reasoning,
27 math and language skill levels.

1 circuits finding a reasoning level of 2 is consistent with simple jobs. Dkt. 14 at 15. Without any
2 supportive authority for plaintiff's argument, this Court cannot assign error.

3 Finally, plaintiff argues that two of the three hypothetical questions the ALJ asked of the VE are
4 not supported by substantial evidence because two of the hypothetical questions did not accurately reflect
5 the RFC assessment assigned to plaintiff by the ALJ. Dkt. 12 at 10-12; Dkt. 15 at 4. Plaintiff disputes
6 the hypothetical questions for which the VE found the jobs of parking lot cashier, assembler, sorter
7 grader suitable, but does not dispute the accuracy or conclusions stemming from the hypothetical
8 question and answer associated with the final assembler job, other than on the grounds discussed above.
9 Plaintiff further argues that the ALJ did not make the non-disabled determination based on work only as
10 an assembler. However, plaintiff cites no authority for the proposition that the ALJ was required to give
11 more than one job, or that the ALJ's decision could not have been based on the ability to perform just one
12 type of job. Whether or not the ALJ's additional hypothetical questions to the VE were properly
13 presented, the ALJ found plaintiff capable of performing work as a final assembler; therefore, because
14 plaintiff can work as an assembler, he is not disabled. The Court does not need to address the sufficiency
15 of the other hypothetical questions because whether or not they were sufficient is immaterial in light of
16 the properly presented and uncontested first hypothetical question.

17 VIII. CONCLUSION

18 For the reasons set forth above, the Commissioner's decision is AFFIRMED and this action is
19 DISMISSED.

20 DATED this 14th day of April, 2008.

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23 Carolyn R. Dimmick
24 United States District Judge
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